Supreme Court, U.S.
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No. 96-1346

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

DANIEL M. PARADIES, THE PARADIES SHOPS, INC., PARADIES MIDFIELD CORPORATION,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

SECOND SUPPLEMENTAL BRIEF FOR PETITIONERS

CONSTANTINE L. TRELA, JR.
JEFFREY H. DEAN
SIDLEY & AUSTIN
One First National Plaza
Chicago, Illinois 60603
(312) 853-7000

Counsel for The Paradies Shops, Inc., and Paradies Midfield Corporation

STEPHANIE E. PARKER
(*Counsel of Record*)
JONES, DAY, REAVIS & POGUE
303 Peachtree Street
Atlanta, Georgia 30308
(404) 521-3939

ROBERT H. KLONOFF
JONES, DAY, REAVIS & POGUE
1450 G Street, N.W.
Washington, D.C. 20005
(202) 879-3939

Counsel for Daniel M. Paradies

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STATEMENT

Petitioners Daniel M. Paradies, The Paradies Shops, Inc., and Paradies Midfield Corporation file this supplemental brief pursuant to Supreme Court Rule 15.8 to inform this Court of the impact of two developments that occurred subsequent to the filing of their papers in this case.

DISCUSSION

1. On December 2, 1997, this Court decided in *Salinas v. United States*, No. 96-738 (Dec. 2, 1997), that the federal bribery statute, 18 U.S.C. § 666(a)(1)(B), does not require the government to prove that the bribe in question had "any particular *influence* on federal funds." *Salinas*, slip op. at 9 (emphasis added). The Court specifically left open, however, the issue of "whether [§ 666] requires some other kind of connection between a bribe and the expenditure of federal funds," noting that in *Salinas* "the bribe was related to the housing of a prisoner in facilities paid for in significant part by federal funds themselves." *Id.* at 6.

Here, the government's bribery theory involved airport concessions, but the government did not prove that those concessions received any federal funds. Instead, the government contended that it was sufficient to show that the City of Atlanta as a whole received such funds, and the district court, over defendants' objection, instructed the jury to that effect. On appeal, defendants argued that this nexus was insufficient, but the Eleventh Circuit felt that it did not need to address that issue because of the wording of the statute. *United States v. Paradies*, Pet. App. 37a-39a, *quoting United States v. Westmoreland*, 841 F.2d 572, 576 (5th Cir.), *cert. denied*, 488 U.S. 820 (1988). By taking that approach, the Eleventh Circuit ignored an issue that this Court in *Salinas* recognized could be significant to the analysis under § 666. This case underscores the importance of the issue left open in *Salinas*: if the only nexus required is that a municipality receive in excess of $10,000 in federal funds, then the nexus requirement would be rendered meaningless. Thus, this Court should give the Eleventh Circuit the opportunity to reexamine its ruling in light of *Salinas*. *See Henry v. Rock Hill,*

376 U.S. 776, 777 (1964) (discussing grounds for granting, vacating, and remanding pending petition for certiorari).

2. Petitioners learned on December 2, 1997, that the petition for a writ of certiorari in *Brumley v. United States*, No. 97-486, is set for conference on December 12, 1997. That petition asks this Court to review and reverse the decision by the United States Court of Appeals for the Fifth Circuit in *United States v. Brumley*, 116 F.3d 728 (5th Cir. 1996) *(en banc)*. The *Brumley* petition raises issues relating to 18 U.S.C. § 1346 that mirror the first question presented in the petition here. The *en banc* Fifth Circuit in *Brumley* found that Congress had overruled *McNally v. United States*, 483 U.S. 350 (1987), by passing 18 U.S.C. § 1346. *Brumley*, 116 F.3d at 730. Nevertheless, in conflict with the Eleventh Circuit's decision here, the *en banc* Fifth Circuit ruled that a federal prosecutor seeking a conviction under § 1346 "must prove that conduct of a state official breached a duty respecting the provision of services owed to the official's employer under state law." *Id.* at 734.

Under these circumstances, petitioners believe that the Court should consider *Brumley* and this case in the same conference, since both petitions present the Court with the opportunity to clarify the scope of prosecution under § 1346. Alternatively, were the Court inclined to deny certiorari in this case and in *Brumley*, if it GVR'ed this case based upon *Salinas*, *see supra*, the Eleventh Circuit would have the opportunity not only to consider the federal funds issue, but also to reexamine its analysis of the mail fraud issue in light of the *en banc* Fifth Circuit *Brumley* decision.

CONCLUSION

For the foregoing reasons and those given in the petition, reply brief and supplemental brief of September 30, 1997, the petition for a writ of certiorari should be granted.

Respectfully submitted,

CONSTANTINE L. TRELA, JR.
JEFFREY H. DEAN
SIDLEY & AUSTIN
One First National Plaza
Chicago, Illinois 60603
(312) 853-7000

Counsel for The Paradies Shops, Inc., and Paradies Midfield Corporation

STEPHANIE E. PARKER
(*Counsel of Record*)
JONES, DAY, REAVIS & POGUE
303 Peachtree Street
Atlanta, Georgia 30308
(404) 521-3939

ROBERT H. KLONOFF
JONES, DAY, REAVIS & POGUE
1450 G Street, N.W.
Washington, D.C. 20005
(202) 879-3939

Counsel for Daniel M. Paradies

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